

will not discriminate against applicants on the basis of race, color, religion, national origin, sex, marital status, or age (provided that the applicant has the capacity to contract); to the fact that all or part of the applicant's income derives from public assistance program; or to the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

(c) *Civil rights compliance.* Recipients of grants must comply with the Americans with Disabilities Act of 1990, Title VI of the Civil Rights Act of 1964, and Section 504 of the Rehabilitation Act of 1973. This may include collection and maintenance of data on the race, sex, and national origin of the recipient's membership/ownership and employees. These data must be available to conduct compliance reviews in accordance with 7 CFR part 1901, subpart E, § 1901.204 of this title. Initial reviews will be conducted after Form RD 400-4 is signed and all subsequent reviews every 3 years thereafter for loans. The last review shall occur 3 years after the date of loan closing. Grants will require one subsequent compliance review after the last disbursement of grant funds have been made, and the facility has been in full operation for 90 days.

(d) *Environmental analysis.* Subpart G of part 1940 of this title outlines environmental procedures and requirements for this subpart. Prospective applicants are advised to contact the Agency to determine environmental requirements as soon as practicable after they decide to pursue any form of financial assistance directly or indirectly available through the Agency.

(1) Any required environmental review must be completed by the Agency prior to the Agency obligating any funds.

(2) The applicant will be notified of all specific compliance requirements, including, but not limited to, the publication of public notices, and consultation with State Historic Preservation Offices and the U.S. Fish and Wildlife Service.

(3) A site visit by the Agency may be scheduled, if necessary, to determine the scope of the review.

(4) The applicant taking any actions or incurring any obligations during the time of application or application review and processing that would either limit the range of alternatives to be considered or that would have an adverse effect on the environment, such as the initiation of construction, will result in project ineligibility.

(e) *Executive Order 12898.* When a project is proposed and financial assistance requested, the Agency will conduct a Civil Rights Impact Analysis (CRIA) with regards to environmental justice. The CRIA must be conducted and the analysis documented utilizing Form RD 2006-38, "Civil Rights Impact Analysis Certification." This certification must be done prior to loan approval, obligation of funds, or other commitments of Agency resources, including issuance of a Letter of Conditions or Form RD 4279-3 of guarantee, whichever occurs first.

(f) *Uniform Federal assistance regulations.* Grants will be administered in accordance with 7 CFR part 3015 of this title.

**§ 4280.115 Construction planning and performing development.**

The requirements of this section apply for planning, designing, bidding, contracting, and constructing renewable energy systems and energy efficiency improvement projects as applicable. For contracts of \$200,000 or less, the simple contract method, as specified in paragraph (e) of this section, may be used. Contracts greater than \$200,000 shall use the contract method specified in paragraph (g) of this section.

(a) *Technical services.* Applicants are responsible for providing the engineering, architectural, and environmental services necessary for planning, designing, bidding, contracting, inspecting, and constructing their facilities. Services may be provided by the applicant's "in-house" engineer or architect or through contract, subject to Agency concurrence. Engineers and architects must be licensed in the State where the facility is to be constructed.

(b) *Design policies.* Facilities funded by the Agency will meet the requirements of 7 CFR subpart C of part 1780, § 1780.57(b), (c), (d), and (o) of this title.

Final plans and specifications must be reviewed by the Agency and approved prior to the start of construction.

(c) *Owners accomplishing work.* In some instances, owners may wish to perform a part of the work themselves. For an owner to perform project development work, the owner must meet the experience requirements of 7 CFR subpart C of part 1780, §1780.67 of this title. For an owner to provide a portion of the work, with the remainder to be completed by a contractor, a clear understanding of the division of work must be established and delineated in the contract. In such cases, the contractor will be required to inspect the owner's work and accept it. Owners are not eligible for payment for their own work as it is not an eligible project cost. See §4280.110(c) of this subpart for further details on eligible project costs.

(d) *Equipment purchases.* Equipment purchases of less than \$200,000 will not require a performance and payment bond, unless required by the applicant, as long as the contract purchase is a lump sum payment and the manufacturer provides the required warranties on the equipment as outlined in paragraph (i) in the applicable section found in Appendices A and B of this subpart. Payment shall be certified by copies of the Manufacturer's paid invoices and warranty documents.

(e) *Simple contract method.* The simple contract method may be used for small projects with a contract not greater than \$200,000. In smaller projects, Agency funds will typically be used to reimburse project costs upon completion of the work as a lump sum payment. Partial payments will be made in accordance with Form RD 4280-2, "Grant Agreement," and Form RD 1924-6, "Construction Contract," or other Agency approved contract. All construction work will be performed under a written contract, as described below. A design/build method, where the same person or entity provides design and engineering work, as well as construction or installation, may be used under this method.

(1) *Contracting requirements threshold.* For contracts above \$100,000, certain Federal requirements, including surety, must be met. An attachment to

the contract may be used to incorporate language for these requirements.

(2) *Forms used.* Form RD 1924-6 or other Agency approved contract must be used. Other contracts must be approved by the Agency and may be used only if they are customarily used in the area and protect the interest of the applicant and the Government with respect to compliance with items such as the drawings, specifications, payments for work, inspections, completion, non-discrimination in construction work and acceptance of the work. The Agency will not become a party to a construction contract or incur any liability under it. No contract shall become effective until concurred in writing by the Agency. Such concurrence statement shall be attached to and made a part of the contract.

(3) *Contract provisions.* Contracts will have a listing of attachments and the minimum provisions of the contract will include:

- (i) The contract sum;
- (ii) The dates for starting and completing the work;
- (iii) The amount of liquidated damages to be charged;
- (iv) The amount, method, and frequency of payment;
- (v) Whether or not surety bonds will be provided. If not, a latent defects bond may be required, as described in paragraph (e)(4) of this section;
- (vi) The requirement that changes or additions must have prior written approval of the Agency; and
- (vii) The warranty period to be provided in accordance with Appendices A and B, sections 1 through 10, paragraph (i)(1).

(4) *Surety.* Surety per 7 CFR subpart C of part 1780, §1780.75(c) of this title will be required, and made a part of the contract, if the applicant requests it, or if the contractor requests partial payments for construction work. If the contractor will receive a lump sum payment at the end of work, the Agency will not require surety. In such cases where no surety is provided and the project involves pre-commercial technology, first of its type in the U.S.,

or new designs without sufficient operating hours to prove their merit, a latent defects bond may be required to cover the work.

(5) *Equal opportunity.* Section 1901.205 of subpart E of part 1901 of this title applies to all financial assistance involving construction contracts and subcontracts in excess of \$10,000. Language for this requirement is included in Form RD 1924-6. If this form is not used, such language must be made a part of the Agency approved contract.

(6) *Obtaining bids and selecting a contractor.* (i) The applicant may select a contractor and negotiate a contract or contact several contractors and request each to submit a bid. The applicant will provide a statement to the Agency describing the process for obtaining the bid(s) and what alternatives were considered.

(ii) When a price has already been negotiated by an applicant and a contractor, the Agency will review the proposed contract. If the contractor is qualified to perform the development and provide a warranty of the work and the price compares favorably with the cost of similar construction in the area, further negotiation is unnecessary. If the Agency determines the price is too high or otherwise unreasonable, the applicant will be required to negotiate further with the contractor. If a reasonable price cannot be negotiated or if the contractor is not qualified, the applicant will be required to negotiate with another contractor.

(iii) When an applicant has proposed development with no contractor in mind, competition will be required. The applicant must obtain bids from as many qualified contractors, dealers, or trades people as feasible depending on the method and type of construction.

(iv) If the award of the contract is by competitive bidding, Form RD 1924-5, "Invitation for Bid (Construction Contract)," or another similar Agency approved invitation bid form containing the requirements of subpart E of part 1901 of this title may be used. All contractors from whom bids are requested should be informed of all conditions of the contract, including the time and place of opening bids. Conditions shall not be established which would give preference to a specific bidder or type

of bidder. When applicable, copies of Forms RD 1924-6 and RD 400-6, "Compliance Statement," also should be provided to the prospective bidders.

(7) *Awarding the contract.* The applicant, with the concurrence of the Agency, will consider the amount of the bids or proposals, and all conditions listed in the invitation. On the basis of these considerations, the applicant will select and notify the lowest responsible bidder. The contract will be awarded using Form RD 1924-6 or similar Agency approved document as described in this section.

(8) *Final payments.* Prior to making final payment on the contract when a surety bond is not used, the Agency will be provided with Form RD 1924-9, "Certificate of Contractor's Release," and Form RD 1924-10, "Release by Claimants," executed by all persons who furnished materials or labor in connection with the contract. The applicant should furnish the contractor with a copy of Form RD 1924-10 at the beginning of the work in order that the contractor may obtain these releases as the work progresses.

(f) *Design/build contracts.* The design/build method, where the same person or entity provides design and engineering work, as well as construction or installation, may be used with Agency written approval. If the design/build contract amount is \$200,000 or less, development and contracting will follow paragraph (e) of this section. If the design/build contract amount is greater than \$200,000, Agency prior concurrence must be obtained as described below, and the remaining requirements of this section apply.

(1) *Concurrence information.* The applicant will request Agency concurrence by providing the Agency at least the information specified in paragraphs (f)(1)(i) through (viii) of this section.

(i) The owner's written request to use the design/build method with a description of the proposed method.

(ii) A proposed scope of work describing in clear, concise terms the technical requirements for the contract. It

should include a nontechnical statement summarizing the work to be performed by the contractor and the results expected, and a proposed construction schedule showing the sequence in which the work is to be performed.

(iii) A proposed firm-fixed-price contract for the entire project which provides that the contractor shall be responsible for any extra cost which may result from errors or omissions in the services provided under the contract, as well as compliance with all Federal, State, and local requirements effective on the contract execution date.

(iv) Where noncompetitive negotiation is proposed, an evaluation of the contractor's performance on previous similar projects in which the contractor acted in a similar capacity.

(v) A detailed listing and cost estimate of equipment and supplies not included in the construction contract but which are necessary to properly operate the facility.

(vi) Evidence that a qualified construction inspector who is independent of the contractor has or will be hired.

(vii) Preliminary plans and outline specifications. However, final plans and specifications must be completed and reviewed by the Agency prior to the start of construction.

(viii) The owner's attorney's opinion and comments regarding the legal adequacy of the proposed contract documents and evidence that the owner has the legal authority to enter into and fulfill the contract.

(2) *Agency concurrence of design/build method.* The Agency shall review the material submitted by the applicant. When all items are acceptable, the loan approval official will concur in the use of the design/build method for the proposal.

(3) *Forms used.* The American Institute of Architects (AIA) Form A191, "Standard Form of Agreement Between Owner and Design/Builder," should be used. Other Agency approved contract documents may be used provided they are customarily used in the area and protect the interest of the applicant and the Agency with respect to compliance with items such as the drawings, specifications, payments for work, inspections, completion, non-

discrimination in construction work, and acceptance of the work. The Agency will not become a party to a construction contract or incur any liability under it. No contract shall become effective until concurred in writing by the Agency. Such concurrence statement shall be attached to and made a part of the contract.

(4) *Contract provisions.* Contracts will have a listing of attachments and shall meet the following requirements:

(i) The contract sum;

(ii) The dates for starting and completing the work;

(iii) The amount of liquidated damages, if any, to be charged;

(iv) The amount, method, and frequency of payment;

(v) Surety provisions that meet the requirements of 7 CFR subpart C of part 1780, §1780.75(c) of this title;

(vi) The requirement that changes or additions must have prior written approval of the Agency;

(vii) The warranty period to be provided in accordance with Appendices A and B, sections 1 through 10, paragraph (i);

(viii) Contract review and concurrence in accordance with 7 CFR subpart C of part 1780, §1780.61(b) of this title;

(ix) Owner's contractual responsibility in accordance with 7 CFR subpart C of part 1780, §1780.68 of this title; and

(x) Further contract provisions concerning remedies, termination, surety, equal employment opportunity, anti-kickback, records, State energy conservation plan, change orders, Agency concurrence, retainage, and other compliance requirements must be met in accordance with 7 CFR subpart C of part 1780, §1780.75 of this title.

(5) *Obtaining bids and selecting a contractor.* The applicant may select a contractor based on competitive sealed bids, competitive negotiation, or non-competitive negotiation as described in 7 CFR subpart C of part 1780, §1780.72(b), (c), or (d) of this title.

(g) *Contract method.* If the contract amount is greater than \$200,000 and is not of the design/build method, the following conditions must be met:

## § 4280.116

## 7 CFR Ch. XLII (1–1–07 Edition)

(1) *Procurement method.* Procurement method shall comply with the requirements of 7 CFR subpart C of part 1780, §§ 1780.72, 1780.75, and 1780.76 of this title.

(2) *Forms used.* The AIA Form A101, “Standard Form of Agreement Between Owner/Contractor,” or Engineering Joint Counsel Document Committee (EJCDC) Form C-521, “Suggested Form of Agreement Between Owner and Contractor (Stipulated Price) Funding Agency Edition,” should be used. Other Agency approved contract documents may be used provided they are customarily used in the area and protect the interest of the applicant and the Agency with respect to compliance with items such as the drawings, specifications, payments for work, inspections, completion, non-discrimination in construction work, and acceptance of the work. The Agency will not become a party to a construction contract or incur any liability under it. No contract shall become effective until concurred in writing by the Agency. Such concurrence statement shall be attached to and made a part of the contract.

(3) *Contract provisions.* Contracts will have a listing of attachments and shall meet the requirements of 7 CFR subpart C of part 1780, § 1780.75 of this title and the following requirements:

- (i) The contract sum;
- (ii) The dates for starting and completing the work;
- (iii) The amount of liquidated damages, if any, to be charged;
- (iv) The amount, method, and frequency of payment;
- (v) Surety provisions that meet the requirements of 7 CFR subpart C of part 1780, § 1780.75(c) of this title;
- (vi) The requirement that changes or additions must have prior written approval of the Agency;
- (vii) The warranty period to be provided in accordance with Appendices A and B, sections 1 through 10, paragraph (i);
- (viii) Contract review and concurrence in accordance with 7 CFR subpart C of part 1780, § 1780.61(b) of this title;
- (ix) Owner’s contractual responsibility in accordance with 7 CFR sub-

part C of part 1780, § 1780.68 of this title; and

(x) Further contract provisions concerning remedies, termination, surety, equal employment opportunity, anti-kickback, records, State energy conservation plan, change orders, Agency concurrence, retainage, and other compliance requirements must be met in accordance with 7 CFR subpart C of part 1780, § 1780.75 of this title.

(4) *Obtaining bids and selecting a contractor.* The applicant may select a contractor based on competitive sealed bids, competitive negotiation, or non-competitive negotiation as described in 7 CFR subpart C of part 1780, § 1780.72(b), (c), or (d) of this title.

(5) *Contract award.* Applicants awarding contracts must comply with 7 CFR subpart C of part 1780, § 1780.70(h) of this title.

(6) *Contracts awarded prior to applications.* Applicants awarding contracts prior to filing an application must comply with 7 CFR subpart C of part 1780, § 1780.74 of this title.

(7) *Contract administration.* Contract administration must comply with 7 CFR subpart C of part 1780, § 1780.76 of this title. If another authority, such as a Federal or State Agency, is providing funding and requires oversight of inspections, change orders, and pay requests, the Agency may accept copies of their reports or forms as meeting oversight requirements of the Agency.

### § 4280.116 Grantee requirements.

(a) A Letter of Conditions will be prepared by the Agency, establishing conditions that must be understood and agreed to by the applicant before any obligation of funds can occur. The applicant must sign a “Letter of Intent to Meet Conditions” and Form RD 1940-1, “Request for Obligation of Funds,” if they accept the conditions of the grant.

(b) The grantee must sign and abide by all requirements contained in Form RD 4280-2 and this subpart.

### § 4280.117 Servicing grants.

Grants will be serviced in accordance with subparts E and O of part 1951 of this title and Form RD 4280-2.